92-1873

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

KATHLEEN LESLIE,

Petitioner,

vs.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS F. PANZA
Counsel of Record

PANZA, MAURER, MAYNARD,
PLATOW & NEEL, P.A.
3081 E. Commercial Blvd.,
Suite 200
Fort Lauderdale, Florida 33308
(305) 491-4000

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether courts may decide as a matter of law that no constitutionally protected property interest is created without making findings of fact as to whether mutually explicit understandings created such an interest in contradiction to established Eleventh Circuit and Supreme Court case law.

II. Whether courts may decide as a matter of law that no constitutionally protected liberty interest is created without making findings of fact as to whether underlying elements of a liberty interest exist.

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OPINIONS BELOW

The per curiam unpublished opinion and judgment of the United States Court of Appeals for the Eleventh Circuit is reprinted in Appendix A. It affirms the summary judgment awarded by order of the United States District Court for the Southern District of Florida. The District Court's Memorandum Opinion granting Motion for Summary Judgment necessary for this Court's determination is reprinted in Appendix B.

JURISDICTION

The judgment of the Untied States Court of Appeals for the Eleventh Circuit was entered on February 17, 1993. This petition is filed within ninety (90) days of that date. This court has jurisdiction to review the judgment on a petition for certiorari pursuant to Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

STATUTES INVOLVED

The relevant statutory provisions involved are 42 U.S.C. § 1983, Florida Statutes § 228.041(10)(c) (1991) and § 231.36(3) (1991) which are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner was employed by Respondent in a non-instructional, administrative position through a series of annual contracts renewed without incident from August, 1977 through June 4, 1992. During this time, Petitioner was subject to review and received nothing but favorable evaluations and promotions from Respondent. Petitioner also relied upon Respondent's Policy and Procedures Manual and evaluation system which implied Petitioner had attained de facto tenure. On April 8, 1991, Respondent notified Petitioner that she was not being recommended for re-appointment (non-renewal) and that her current status would expire on June 30, 1991. On January 20, 1991, Petitioner was removed from her position as Director I, Budget and put on task assignment in an unrelated department of the Respondent's facility. When Petitioner was not nominated by the Superintendent to renew her contract for the 1992-93 school year, she filed a federal lawsuit on May 14, 1991.

Eight days after filing the lawsuit on May 22, 1991, Respondent executed a Petition for Dismissal which sought the immediate suspension, without pay, of Petitioner. The Petition for Dismissal alleged that Petitioner engaged in the practice of systematically excluding minority applicants for professional positions within Respondent's Budget Office. On June 4, 1991, Petitioner was fired without pay or benefits. This termination was distinct from the non-renewal. The federal lawsuit filed by Petitioner was based on the non-renewal of her contract, not this termination.

On June 7, 1991, Petitioner requested a formal Administrative Hearing on the Petition for Dismissal (termination) and the matter was referred to the Florida Division of Administrative Hearings. A hearing was conducted pursuant to Florida Statute § 120.57(1) regarding this termination, but no determination has yet been made by that court. No hearings of any sort have been held with regard to the non-renewal of Petitioner.

This action involves a claim for violation of the United States Constitution Fourteenth Amendment's protection of property and liberty interests pursuant to 42 U.S.C. § 1983 and for pendent state claims for breach of contract, intentional infliction of emotional distress, negligent supervision, and injurious falsehoods. The United States District Court for the Southern District of Florida, Miami Division, maintained original jurisdiction over the instant action pursuant to both 28 U.S.C. § 1331 and 28 U.S.C. § 1343. That court granted Respondent's Motion for Summary Judgment on March 24, 1992. Petitioner appealed the District Court's Order and, on February 17, 1993, the United States Court of Appeals for the Eleventh Circuit, by and through the Circuit Judges, Hatchett and Black, and Senior Circuit Judge Dyer, issued a per curiam opinion affirming the lower court's award of Summary Judgment. Petitioner additionally sought a rehearing en banc of that decision, pursuant to 28 U.S.C. § 1291, but received no response.

The instant appeal is from a Final Order which disposed of all claims with respect to all parties.

REASONS FOR GRANTING THE WRIT

I. The decision below that no constitutionally protected property interest is created without making findings of fact as to whether mutually explicit understanding created such an interest is in contradiction to established Eleventh Circuit and Supreme Court case law.

This Petition for Writ of Certiorari is the result of an award and affirmation of a Summary Judgment Motion below. Summary Judgment should only be entered "if there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Clemons v. Dougherty County, Ga.*, 684 F.2d 365, 368 (11th Cir. 1982). This burden falls upon the shoulders of Respondent, the movant in this case. They must demonstrate that all issues may be decided as a matter of law after all evidence and all factual inferences are construed in a light most favorable to the Petitioner. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *Clemons v. Dougherty County, Ga.*, 684 F.2d at 1368 (11th Cir. 1982); *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532, 1535 (11th Cir. 1989). As this court reflects upon whether Respondent violated Petitioner's constitutionally protected property interest in continued employment with Respondent, they should consider that the Supreme Court has long recognized that a government employee may have a constitutionally protected property interest in that governmental employment. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court found that a government employee may

hold a property interest in re-employment by either of two means. The employee may have a contract which clearly defines his or her property interest. Or, the employee may have mutually explicit understandings with her employer which give rise to a property interest. On this latter method, the Court noted:

> The absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a property interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreement, though not formalized in writing, be 'implied.' 3a *Corbin on Contracts*, §§ 561-572(a) (1960). Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in light of the surrounding circumstances. *Id*, at § 572. And, the meaning of the promisor's words is found by relating them to the usage of the past. *Ibid*. *Perry v. Sindermann*, 408 U.S. at 602 (1972).

Petitioner, in the instant case, has made numerous allegations that similar mutual understandings exist in her case and have given rise to the creation of a constitutionally protected property interest.

The District Court, and now the Eleventh Circuit Court of Appeals, has held that Summary Judgment is proper despite these allegations of mutual understandings which can only be determined as valid or invalidly creating constitutionally protected property interest upon findings of fact. Though the Eleventh Circuit offers no reasons for its unpublished per curiam opinion, the District Court erroneously decided to grant the Motion for

Summary Judgment based on its flawed analysis of Florida law and improper interpretation of Supreme Court precedent.

The basic error committed by the lower court involves their confusion regarding the relationship between state law and the "mutual understandings" allowed by *Sindermann* and *Roth*. The lower court, like Respondent, incorrectly frames the question in terms of whether Florida law "creates a property interest." At the same time, all case law they rely upon formed decisions based upon whether state law "prohibits" creation of a property interest. **The fundamental issue before this Court is whether it will create new precedent requiring state statutes to confer the status of constitutionally protected property interest in particular fields of employment before ever awarding the status of property interest in any person's employment. This would have the effect of wiping out well-established case law that property interest may be created through "mutual understandings" between employer and employee. It must be acknowledged that this is a reversal of former Eleventh Circuit and Supreme Court case law.**

In *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985), the Eleventh Circuit Court of Appeals held that the constitutionally protected property interest in continued employment "may be created by law *or* through some mutually explicit understanding between the parties." *Id.* at 1185, citing *Perry v. Sindermann*, 408 U.S. 593, 600-602 (1972) (Emphasis added). That court reiterated the long-standing law that either of the two methods may work to create a constitutionally protected interest. The court set out a two-prong test

which may only be satisfied upon a full fact review by a trier of fact. The first part of the test is whether state law, in this case Florida law, created a property interest in the Petitioner's employment position. *Id.* at 1186. If no property interest is created by state law, the court must then turn to the next step. The *Sullivan* court framed the issue in this way:

> Florida law does not create a protected property interest for employees in Ms. Sullivan's position . . . ***Nor*** do we find that there was any mutually explicit understanding between the parties sufficient to create a protected property interest in continued employment. *Id.* at 1186. (Emphasis added)

The second prong of the *Sullivan* test requires "findings" in order to determine whether mutually explicit understandings existed or not. In *Sullivan* this finding was made at the conclusion of a nine-day bench trial. The award of Summary Judgment in the instant case bars any such finding of fact and eliminates *Sullivan's* two-prong test.

If allowed to stand, this holding will constitute a departure from established precedent which effectively undermines Supreme Court holdings in *Roth* and *Sindermann* by eliminating the possibility of the property interest being created based on mutually explicit understandings and, instead, replacing that possibility with a requirement that the position be anointed by state law as a protected position. The only way to avoid this conclusion is reliance on cases which are distinguishable from the instant case.

Respondent and the lower court must base their decision upon three Circuit Court cases which hold that a mutual understanding of continued employment cannot create a property interest *contrary* to state law. *Warren v. Crawford*, 927 F.2d 559, 563-64 (11th Cir. 1991); *Batterton v. Texas General Land Office*, 783 F.2d 1220, 1224 (5th Cir. 1986), cert. denied, 479 U.S. 914 (1986); and *Driggins v. City of Oklahoma City*, 954 F.2d 1511, 1515 (10th Cir. 1992). But, in turn, of each of these cases may be distinguished in that, in each case, a mutual understanding was not permitted to create a property interest **only where state law specifically and explicitly held that such an interest could not be created in a particular position.**

In *Warren*, the court found that:

> **Under Georgia law,** in the absence of controlling contract between the parties, employment for an indefinite period is terminable at will by either party. *Id.* at 562, citing *Land v. Delta Airlines*, 130 Ga. App. 231, 203 S.E.2d 316 (1973); **See also Ga. Code Ann. § 34-7-1 (1988).** *Warren* at 562. (Emphasis added).

Here, the *Warren* court disallows the creation of a property interest by mutually explicit understandings because a state law, Ga. Code Ann. § 34-7-1, specifically addressed that employment position as an "at will" position, prohibiting the creation of a property interest. *Id.* Again in *Driggins*, the party seeking the establishment of a property interest in their employment was employed "solely for the good of the service" or in the "interest of the service" of his immediate employer under the city charter which constituted state law. The *Driggins* court found this

to be state law which prohibited the creation of a property interest despite any mutual understanding. *Driggins* at 1513. And finally in *Batterton*, the Fifth Circuit Court of Appeals acknowledged the lower court's identification of state law as "the center of the maelstrom." *Batterton* at 1222. The court held that the local code granted the employers "the power to fire any employee for any reason," thus, no property interest could be created by mutual understandings in contradiction to this explicit state law. *Id.* at 1223.

The conclusion we can reach from these three cases is that if state law is **contrary** to the creation of a property interest in a particular field of employment, no mutual understandings can overcome that state law. The case of *Batterton* itself summed up what decisions faced the court if state law is not dispositive:

> The Supreme Court's holding that an informal understanding may lead to a property interest must therefore be recognized as standing in the absence of an officially promulgated position, one way or the other, on the issue of a teacher's tenure. Here, we have interpreted § 3.020 as establishing a clear and official stand; having done so, we conclude that informal understandings and customs contrary, and subsequent, to the enactment of that statute cannot be the source of an employee's property interest. *Id.* at 1223.

So, in Florida, the court must turn to face our own center of the maelstrom. This Court must determine whether Florida law determines, one way or another, the property interest which may or may not be created in Petitioner's employment. If state law says nothing, the

court must, under Supreme Court precedent, then turn to mutual understandings between the parties to determine whether a property interest exists. Such examination of mutual understanding can only take place through the fact finding process and through the reversal of Summary Judgment.

Examination of Florida law reveals that it is silent as to Petitioner's employment status. Petitioner was a professional administrative assistant as defined under Florida law. F.S. § 228.041(10)(c). Depending on their classification and duration of employment, Florida school district personnel may be employed under "a continuing contract," "professional services contract," "annual contract," or a contract for some other fixed term. F.S. § 231.36. Continuing contracts do not expire and professional services contracts are renewed as a matter of course each year unless just cause is shown to do otherwise. F.S. § 231.36(3)(e). Florida law also makes provisions for procedures under which a continuing contract or professional services contract employee may be returned to annual contract status, as well as procedures for dismissal of these employees during the school year. F.S. § 231.36(3)(e)(4). Florida law is *silent* as to the rights of annual contract employees, such as Petitioner. **No section of any Florida state law prohibits the creation of a property interest in an annual contract employee such as Petitioner's position as a professional administrative assistant.** Florida law does not speak to this issue in one direction or another.

Thus, under Supreme Court precedent, the next step which must be taken by this Court is examination of

mutual understandings which may have arisen in Petitioner's position due to numerous conversations with her supervisors, performance evaluations over a spotless 13-year employment history, and reliance upon a 184-page Policy and Procedures Manual. Again, the Eleventh Circuit Court of Appeals has held that allegations as to such facts require a trier of fact to resolve the facts which might underlie a legal conclusion making Summary Judgment inappropriate. *Lassiter v. Covington*, 861 F.2d 680, 684 (11th Cir. 1988) (Holding determination of whether policy manual created mutual understandings and, therefore, property interest, required fact finding and reversal of Summary Judgment). This examination may only be accomplished through reversal of Summary Judgment and remand for a complete fact finding hearing. To hold otherwise constitutes a reversal of the Eleventh Circuit's holding in *Sullivan* and a contradiction of the Supreme Court's holdings in *Roth* and *Sindermann*.

II. The decision below that no liberty interest is created without making findings of fact is contrary to established case law of other Circuit Courts of Appeal and Supreme Court case law.

The determination of whether a liberty interest exists is unaffected by whether a property interest exists. *Wells v. Doland*, 711 F.2d 670, 676 (5th Cir. 1983). In the instance of a property interest in addition to a liberty interest, a name-clearing hearing is mandated. *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1344 (11th Cir. 1984). If a property interest is at stake, a pre-deprivation hearing is required in order to prevent substantially unfair or mistaken deprivation of that interest. *Matthews v. Eldrige*, 424

U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Carey v. Phiphus*, 407 U.S. 67 (1972).

Even without a protected property interest, a claimant may have a protected liberty interest. *Wells* at 676. When a public employer, in refusing to rehire to employee, makes charges against her that might seriously damage her standing in the community or otherwise impose a stigma on the employee which forecloses her freedom to take advantage of other employment opportunities, the employee's liberty interest is implicated and she should be granted the opportunity of a hearing to clear her name. *Board of Regents v. Roth*, 408 U.S. 564, 573-575 (1972); *White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981). This liberty interest deprivation is actionable under 42 U.S.C. § 1983. *Codd v. Velger*, 429 U.S. 624 (1977).

The standard to determine whether a liberty interest has been violated without due process of law requires proof of the following elements:

1) A false statement;
2) Of a stigmatizing nature;
3) Attending a governmental employee's discharge;
4) Made public;
5) By the governmental employer;
6) Without a meaningful opportunity for employee name clearing. *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989).

Whether the accusations made by the School Board's employees were false as alleged in the Complaint, is a

material issue which remains unresolved as it has never been conceded or refuted by Respondent. Petitioner was the subject of an investigation which besmirched and ruined her character for months. The culminating event of this witch hunt was the non-renewal of Petitioner on April 23, 1991, rather than her termination which occurred on May 22, 1991, some eight days after the Complaint in the instant case was filed. At the time that this action was instituted, alleging deprivation of a liberty interest, Petitioner had never been terminated. Thus, the termination cannot be the subject matter of the liberty interest deprivation complaint.

No hearing was ever held in which the Petitioner was given a meaningful opportunity to clear her name regarding her non-renewal and the accusations surrounding that act. Respondent argues that a Division of Administrative Hearings (DOAH) Post-Termination Hearing constituted a sufficient name clearing hearing to satisfy liberty interest concerns. However, this DOAH hearing is a direct result of the termination of Petitioner on May 22, 1991, and does not answer the accusations and stigma attached to Petitioner through her months of investigation and non-renewal on May 14, 1991.

The award of a Summary Judgment when no liberty interest hearing of any sort has ever been held on the fundamental cause of action flies in the face Supreme Court and Eleventh Circuit Court of Appeals precedent. *Campbell v. Pierce Co., Ga.*, 741 F.2d 1342, 1344 (11th Cir. 1984), *Board of Regents v. Roth*, 408 U.S. 564, 573-575 (1972).

CONCLUSION

The affirmation of Summary Judgment granted below will constitute new and unwarranted precedent in Eleventh Circuit and Supreme Court case law regarding a constitutionally protected property and liberty interest.

Formerly, an appellant may demonstrate a constitutionally protected property interest by either showing mutually explicit understandings between the employer and employee or by demonstrating state law granted the status of a property interest in that employment. Should the affirmation of Summary Judgment stand, this Court will have overturned the prior Supreme Court and Eleventh Circuit precedent and created a new proposition: That no constitutionally protected property interest may be created unless explicitly created by state law, regardless of any mutual understandings between employer and employee.

Similarly, if the lower court's decision is affirmed, precedent requiring a name-clearing hearing for the deprivation of any liberty interest will be overturned as this court will have decided that, as a matter of law, a claimant's liberty interest may be determined unworthy of a name-clearing hearing without findings of fact regarding the underlying elements of that liberty interest claim.

The presence of these and numerous other questions of fact in the instant case make the award of Summary Judgment as a matter of law unjustifiable. Petitioner

respectfully requests that this Petition for Writ of Certiorari be granted to address the Eleventh Circuit's departure from this Court's jurisprudence and that of other circuits.

THOMAS F. PANZA
Counsel of Record

PANZA, MAURER, MAYNARD, PLATOW
& NEEL, P.A.
3081 East Commercial Boulevard
Suite 200
Fort Lauderdale, Florida 33308
(305) 491-4000

Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNTIED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-4365

D. C. Docket No. 91-6359-CIV-FAM

KATHLEEN LESLIE,

Plaintiff/Appellee,

versus

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,

Defendant/Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 17, 1993)

Before HATCHETT and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

Affirmed. See Eleventh Circuit Rule 36-1.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 91-6359-CIV-MORENO

KATHLEEN LESLIE,

Plaintiff,

vs.

THE SCHOOL BOARD OF
BROWARD COUNTY, FLORIDA,

Defendant.

_____/

MEMORANDUM OPINION GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon the Defendant's Motion for Summary Judgment.

THE COURT has considered the Motion, responses, oral argument, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED.

FACTS

Plaintiff, Kathleen Leslie, was employed by Defendant from August, 1977 to June 4, 1992. In April of 1990, Leslie was appointed Director I, Budget for the 1990-91 school fiscal year. The position of Budget Director is a non-certified, non-instructional administrative position. As prior years, Leslie's appointment was on an annual contract basis for the upcoming school fiscal year.

The Superintendent of Schools for Broward County, in April of 1991, nominated, in writing, persons to fill non-certified, non-instructional positions for the 1991-92 school fiscal year. By letter dated April 8, 1991, the Superintendent notified Leslie that she was not being recommended for reappointment and that her current annual contract would expire on June 30, 1991. The Superintendent's nominations for appointment and reappointment were approved by the Defendant on April 23, 1991. Leslie was not reappointed for the 1991-92 school fiscal year.

On May 22, 1991, the Superintendent executed a petition of dismissal which sought the immediate suspension, without pay, and dismissal. In pertinent part, the petition for dismissal asserted that Leslie engaged in the practice of systematically excluding minority applicants for professional positions with the Budget office. On June 4, 1991, the School Board approved the Superintendent's recommendation and suspended Leslie without further pay or benefits.

In June of 1991, Leslie requested a formal hearing on the petition for dismissal and the matter was referred to the Department of Administrative Hearings. This administrative hearing was originally scheduled during the fall of 1991. Leslie's administrative hearing was commenced on February 10, 1992.[1]

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[1] Plaintiff's counsel has filed a Notice before this Court, dated February 28, 1992, advising that the administrative hearing was commenced on February 10, 1992 and that this hearing would be re-convened for completion on June 8, 1992.

Plaintiff seeks compensatory damages and punitive damages together with injunctive relief and an award for attorney's fees. Relief is sought for an alleged violation of 42 U.S.C. § 1983 (Count I), together with pendent state claims for breach of contract, intentional infliction of mental distress, negligent supervision and injurious falsehoods Counts II through V.

The federal claim asserts a procedural due process violation based on the alleged deprivation of both a property and liberty interest. Initially, Leslie asserts that she had a property right to be nominated by the Superintendent and reappointed as Budget Director for the 1991-92 school fiscal year. Plaintiff asserts that personnel policies adopted by Defendant entitled her to nomination and reappointment unless just cause for her dismissal was established following notice and an opportunity to be heard.

Leslie also claims that false and stigmatizing charges of racial discrimination were directed against her by coemployees during the time of her non-renewal. She asserts that these charges of racial discrimination were made public and that the Broward School Board has deprived her of a protected liberty interest by failing to make available a meaningful opportunity to be heard.

LEGAL ANALYSIS

A. Plaintiff Has No Protected Property Interest

State law creates and defines the parameters as to what constitutes a Plaintiff's property interest for suits

brought pursuant to 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693, 709, 96 S.Ct. 1155-1164 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701-09 (1972). Whether state law has created a property interest is a legal question for the Court. *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Cir. 1989), *rehearing denied*, 898 F.2d 1490 (11th Cir. 1990). In order to examine Plaintiff's claim that she has a protected property interest to be reappointed as Budget Director for the 1991-92 school fiscal year, it is first necessary to review the personnel procedures established for school districts under Florida Law. *See*, Fla.Stat. Ch. 228, 229, 230 and 231.

School district employees are generally classified as either instructional, administrative or clerical. As Budget Director, Plaintiffs was a non-certified, administrative employee and more specifically classified as a professional administrative assistant. *See*, Fla.Stat. § 228.041(10)(c).

Under Florida Law, the School Board and Superintendent share responsibility in personnel matters. The Superintendent has the duty to nominate persons to fill approved positions. Fla.Stat. § 230.33(7)(9). The School Board can accept the person nominated by the Superintendent or, for good cause, can reject the employee nominated and require the Superintendent to nominate another person. Fla.Stat. § 230.23(5)(9).

Based on their classification and duration of employment, school district personnel can be employed under a continuing contract, professional service contract, annual contract, or contract for some other fixed term. *See*,

Fla.Stat. § 231.36. Effective July 1, 1984, the Florida Legislature prohibited the issuance of any new continuing contracts and established a procedure by which school districts could issue a professional service contract to instructional personnel who complete specified requirements.[2] Fla.Stat. § 231.36(3). Clearly, professional administrative assistants, such as Leslie, are not eligible for professional service contracts.

Continuing contracts do not expire and professional services contracts are renewed as a matter of course each year, Fla.Stat. § 231.36(3)(e). Florida Law establishes procedures by which continuing contract and professional service contract employees may be returned to annual contract status as well as procedures for the dismissal of these employees during the school year. *See*, Fla.Stat. §§ 231.36(3) and 231.36(4). Although procedures are likewise established for the dismissal of annual contract employees during the school year, there is no statute, ordinance or personnel policy which entitles annual contract employees, such as the Plaintiff, to reappointment at the end of the school year. *See*, Fla.Stat. § 231.36(6).

Under Florida Law, it is clear that Plaintiff did not have a property interest which entitled her to reappointment as Budget Director for the 1991-92 school year. Plaintiff was employed as a professional administrative assistant under an annual contract expiring on June 30,

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[2] Prior to 1967, professional administrative assistants were eligible for continuing contract status. Effective September 12, 1967, the Florida Legislature eliminated professional administrative assistants entitlement to continuing contracts. *See*, Op. Atty. Gen., 068-9, January 19, 1968.

1991. No statute, ordinance or personnel policy regulation adopted by the Florida Legislature or the Defendant entitled Leslie to be nominated by the Superintendent for employment as the Budget Director for the 1991-92 school year.

Leslie's assertion that personnel policies adopted by the School Board concerning the assessment and termination of non-instructional employees created a protected property interest in her reappointment on an annual basis as Budget Director is misplaced. A similar claim was rejected by the United States Court of Appeals for the Eleventh Circuit in *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1185-86 (11th Cir. 1985).

In *Sullivan*, an assistant superintendent was employed by the Pinellas County School Board for approximately five years. As a consequence of various complaints about the assistant superintendent's demeanor, the Superintendent of the Pinellas County School District informed the assistant superintendent that he would not recommend her for reappointment the following year. At the end of the school year, the assistant superintendent's contract terminated and she was not reappointed by the School Board for the following year. In rejecting the assistant superintendent's claim of a protected property interest, the Eleventh Circuit Court held as follows:

> Florida Law does not create a protected property interest for employees in Ms. Sullivan's position, which was a non-tenured, non-certified, non-instructional year to year position subject to an annual notice of appointment. The rules applicable to such employees are found in

> the School Board Policy 6GX52-6.05 and Florida Statutes § 230.23(5)(b) (1979). Under these authorities, if Ms. Sullivan had a protected property in continued employment, it attached only when the Superintendent recommended her appointment. *Id.* at 1186.

The Eleventh Circuit in *Sullivan* also rejected the argument that personnel policies which mandate performance evaluations for employees such as the assistant superintendent, created a protected property interest in continued employment. *Id.* at 1186.

Leslie's assertion that she was entitled to be nominated by the Superintendent and reappointed as Budget Director for the 1991-92 school year, absent a showing of good cause coupled with an opportunity to be heard, erroneously eliminates the distinction which exists between school district employees who have annual contract status and those who have continuing contract or professional service contract status. School district employees who have continuing contract or professional service contract status have a property right in their employment during the school year as well as a property right to reappointment for the following school year. *See,* Fla.Stat. § 231.36(3)(e) and 231.36(4). Annual contract employees also have a property interest in their employment during the school year, but do not have a property right to reappointment for the following school year. *See,* Fla. Stat. § 231.36(6). An annual contract employee acquires a property right to reappointment *only* when the

employee is nominated for reappointment by the Superintendent. *Von Stephens v. School Board of Sarasota County*, 338 So. 2d 890, 894-5 (Fla. 2d DCA 1976).[3]

B. Liberty Interest

Plaintiff also asserts that false and stigmatizing charges of racial discrimination on her part were made public during the time of her non-appointment thereby depriving her of a protected liberty interest. In *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir. 1989), the United States Court of Appeals for the Eleventh Circuit enunciated the standard for determining whether a deprivation of a liberty interest has occurred without due process of law. *Buxton* requires that Plaintiff prove: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employee's discharge (4) made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing. *Id.* at 1042-43.

In the present case, it is clear that the School Board has provided Leslie with a meaningful opportunity to clear her name. The Defendant correctly notified the Plaintiff of her opportunity to request a formal hearing on the charges of discrimination which she claims were false

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[3] As stated by Florida's Second District Court of Appeals in *Von Stephens*:

> A superintendent, of course, exercises his discretion in selecting and nominating school personnel. The superintendent exercised this discretionary duty by submitting appellant's name to the board. It is clear to us that the interest of the appellant was created and his right to due process vested at that time. *Id.* at 895.

and stigmatizing. Indeed, Plaintiff has availed herself of the opportunity for a formal hearing and the matter has been referred to the Florida Department of Administrative Hearings. The administrative hearing in the case of *Broward County v. Kathleen Leslie*, Case No. 91-3863, was commenced on February 10 - February 14, 1992 and is scheduled to be completed on June 8, 1992.

In cases where a liberty interest arising from reputational damage is implicated, the hearings serve not to avert the unjustified denial of a specific benefit, but allow the aggrieved party to clear her name. *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1046 (11th Cir. 1984). The Eleventh Circuit has declared the procedural requisites of a name clearing hearing is provided simply to cleanse the reputation of the claimant, the hearing not take place prior to her termination or to the publication of related information adverse to her interests. *Id.*

At the formal administrative hearings Leslie is being given the opportunity to respond, present evidence and argument on the charges of racial discrimination, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact, to file exceptions to any order or hearing officer's recommended order, and to be represented counsel. Clearly, the administrative hearing offered to and accepted by Leslie satisfies federal due process requirements and precludes the deprivation of any protected liberty interest without due process of law.

Pendent State Claims

It is well established that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. *United Mine*

Workers of America v. Gibbs, 383 U.S. 715, 726 (1966); *Moynahan v. Pari-Mutuel Employees Guild*, 317 F.2d 209, 211-212 (C.A.1st Cir. 1950); *Massachusetts Universalist Convention v. Hildreth & Rogerrs Co.*, 183 F.2d 497 (C.A.1st Cir. 1950). The justification for pendent jurisdiction lies in considerations of judicial economy and convenience and fairness to the litigants. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). If these are not present, a federal court should hesitate to exercise jurisdiction over state claims. *Id.* at 726, *citing*, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

In the absence of a viable federal claim, this Court has the discretion to refuse to exercise jurisdiction over the pendent state claims asserted in Counts II through V. *See, United Mine Workers of America v. Gibbs*, at 726. With respect to Counts II through V, it is clear that state issues substantially predominate in terms proof and the scope of the issues raised. Accordingly, this Court refuses to exercise jurisdiction over Counts II through V which involve issues that are more appropriately left to settlement in state court litigation. For the foregoing reasons, it is

ADJUDGED that Defendant, School Board, is entitled to judgment as a matter of law on Count I of Plaintiff, Leslie's, Complaint because Plaintiff does not have a protected property interest under Florida Law in being nominated or reappointed Budget Director for the 1991-92 school year and because Defendant has made available to Plaintiff a meaningful opportunity for name clearing

which satisfies federal due process requirements and precludes the deprivation of any protected liberty interest. In the absence of a viable federal claim, the Court, in its discretion, refrains form exercising jurisdiction over the remaining pendent state claims asserted in Counts II through V of the Plaintiff's Complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of March, 1992.

UNITED STATES DISTRICT JUDGE
FEDERICO A. MORENO

copies provided:

Thomas F. Panza, Esq.
Michael T. Burke, Esq.

APPENDIX C

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Florida Statute § 228.041. Definitions

Specific definitions shall be as follows, and wherever such defined words or terms are used in the Florida School Code, they shall be used as follows:

* * *

(10) Administrative personnel. – Administrative personnel comprises the superintendent, supervisors, principals, and those persons who may be employed as professional administrative assistants to the superintendent or to the principal, but does not include secretarial, clerical, or other office assistants.

(a) *Supervisor.* – A supervisor is a non-school-based employee, qualified in accordance with s. 231.15, who is assigned responsibility for working directly with teachers and other personnel in improvement of the instructional program.

(b) *Principal.* – A principal is an employee, qualified in accordance with s. 231.15, who is assigned responsibility for administrative direction and instructional supervision at an individual school. For purposes of classification, he may be either:

1. A building principal who is designated as the administrative head of a school; or

2. An assistant principal who is assigned limited administrative and supervisory duties within a school.

(c) *Professional administrative assistant.* – A professional administrative assistant is an employee assigned responsibility as an administrative or supervisory head of a support activity, noninstructional activity, or district-level function.

* * *

Florida Statute § 231.36

* * *

(3)(a) The school board of each district shall provide a professional service contract as prescribed herein. Each

member of the instructional staff who completes the following requirements prior to July 1, 1984, shall be entitled to and shall be issued a continuing contract in the form prescribed by rules of the state board pursuant to s. 231.36, Florida Statutes 1981. Each member of the instructional staff who completes the following requirements on or after July 1, 1984, shall be entitled to and shall be issued a professional service contract in the form prescribed by rules of the state board as provided herein:

1. The member must hold a professional certificate as prescribed by s. 231.17 and rules of the State Board of Education;

2. The member must have completed 3 years of probationary service in the district, 1 year of which shall be the beginning teacher program where required, during a period not in excess of 5 successive years, except for leave duly authorized and granted; and

3. The member must have been recommended by the superintendent for such contract and reappointed by the school board based on successful performance of duties and demonstration of professional competence.

(b) The professional service contract shall be effective at the beginning of the school fiscal year following the completion of all requirements therefor.

(c) The period of service provided herein may be extended to 4 years when prescribed by the school board and agreed to in writing by the employee at the time of reappointment.

(d) A school board may issue a continuing contract prior to July 1, 1984, and may issue a professional service

contract subsequent to July 1, 1984, to any employee who has previously held a professional service contract or continuing contract in the same or another district within this state. Any employee who holds a continuing contract may, but is not required to, exchange such continuing contract for a professional service contract in the same district.

(e) A professional service contract shall be renewed each year unless the superintendent, after receiving the recommendations required by s. 231.29(5), charges the employee with unsatisfactory performance as determined under the provisions of s. 231.29 and notifies the employee in writing, no later than 6 weeks prior to the end of the postschool conference period, of performance deficiencies which may result in termination of employment, if not corrected during the subsequent year of employment (which shall be granted for an additional year in accordance with the provisions in subsection (1)). Except as otherwise hereinafter provided, this action shall not be subject to the provisions of chapter 120, but the following procedures shall apply:

1. On receiving notice of unsatisfactory performance, the employee, on request, shall be accorded an opportunity to meet with the superintendent or his designee for an informal review of the determination of unsatisfactory performance.

2. An employee notified of unsatisfactory performance may request an opportunity to be considered for a transfer to another appropriate position, with a different supervising administrator, for the subsection year of employment.

3. During the subsequent year, the employee shall be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. The employee shall also be evaluated periodically so that he will be kept apprised of progress achieved.

4. Not later than 6 weeks prior to the close of the postschool conference period of the subsequent year, the superintendent, after receiving and reviewing the recommendation required by s. 231.29(5), shall notify the employee, in writing, whether the performance deficiencies have been corrected. If so, a new professional service contract shall be issued to the employee. If the performance deficiencies have not been corrected, the superintendent may notify the school board and the employee, in writing, that the employee shall not be issued a new professional service contract; however, if the recommendation of the superintendent is not to issue a new professional service contract, and if the employee wishes to contest such recommendation, the employee will have 15 days from receipt of the superintendent's recommendation to demand, in writing, a hearing. In such hearing, the employee may raise as an issue, among other things, the sufficiency of the superintendent's charges of unsatisfactory performance. Such hearing shall be conducted at the employee's election in accordance with one of the following procedures:

a. A direct hearing conducted by the school board within 45 days of receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of s. 120.57(1)(1)1. A majority vote of the membership of the school board shall be required to sustain the superintendent's recommendation. The determination of

the school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or

b. A hearing conducted by a hearing officer assigned by the Division of Administrative Hearings of the Department of Administration. The hearing shall be conducted within 45 days of receipt of the written appeal in accordance with chapter 120. The recommendation of the hearing officer shall be made to the school board. A majority vote of the membership of the school board shall be required to sustain or change the hearing officer's recommendation. The determination of the school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

* * *